On Jury Nullification

The following is an excerpt from an article written by United States District Court Judge Frederic Block entitled "Reflections on Guns and Jury Nullification - and Judicial Nullification", which was recently published in the Champion Magazine, a publication of the National Association of Criminal Defense Lawyers.

The province of a jury to disregard the law and engage in nullification has spawned debate and controversy throughout the years, and has been the subject of extensive commentary. The origin of jury nullification traces back to the mother country in the 1670 decision in Bushell's Case, which arose out of the underlying prosecution of Quakers William Penn and William Mead for unlawful assembly. At trial, the evidence of the defendants' guilt under the applicable statutes was "full and manifest," but the jury "acquitted [the defendants] against the direction of the court in matter of law, openly given and declared to them in court. After juror Bushell was imprisoned for disobeying the judge's instructions, he sought habeas relief in the Court of Common Pleas, where Chief Justice Vaughan ruled that the detentions were unlawful, stating that "how manifest soever the evidence was, if it were not manifest to [the jury], and that they believe it such, it was not a finable fault, nor deserving imprisonment…." Bushell's Case is widely cited as the first precedent for the independence of the jury.

Closer to home, the John Peter Zenger trial in 1735 is the foremost historic example of jury nullification in the United States. Zenger was charged with publishing seditious libels against the governor of New York; it was clear he had published the writings in question. Although the court instructed the jury that it could only consider whether Zenger had printed the material at issue and could not consider the truth or falsity of the writing, the jury acquitted Zenger, believing that he had printed the truth and should not be convicted."

As exemplified by the Zenger trial, the independence of the jury emerged as a central value of liberty in the new American republic. As one commentator has noted: "The proponents of the jury's power and right to nullify the law suggest that juries have traditionally had that power and right. The nullification power was explicit in the American courts until the 1850's." Even as late as 1910, Harvard Law School's eminent Dean Roscoe Pound wrote: "Jury lawlessness is the greatest corrective of law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers."

There subsequently arose a more formalistic, anti-nullification view, as articulated by the Supreme Court in Sparf v. United States. In Sparf, which arose from a murder trial, the trial court had refused to comply with the jury's request for instructions on the "lesser" charge of manslaughter because, while the jury apparently did not believe that it could acquit entirely, its request for instructions as to manslaughter showed that it was considering exercising leniency by convicting of the lesser offense, notwithstanding its legal inapplicability to the scenario at issue. The Supreme Court held that the trial judge had not erred in refusing the jury's request. The Sparf court read Bushell's Case narrowly – not as explicitly permitting jurors to nullify based on their personal view of the law, but merely as holding that Bushell could not be punished

because "it could never be proved" that his refusal to convict was based upon his disregard of the law (which would have been impermissible), rather than his personal view of the evidence (which would have been permissible, however questionable). The Sparf court's holding followed from its fear that "[p]ublic and private safety alike would be in peril if the principle [were] established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves."

This anti-nullification view was expressed once again in Horning v. District of Columbia, where the Supreme Court gave its approbation, over the dissent of Justice Brandeis, to the trial judge's jury instruction that "a failure by you to bring in a [guilty] verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law…" Hewing to its formalistic approach, the majority opinion in Horning stated: "In [a case where the facts are not in dispute] obviously the function of the jury if they do their duty is little more than formal." While the Supreme Court recognized that the trial judge had "[p]erhaps [displayed] a regrettable peremptoriness of tone" in his comments on potential jury nullification, it concluded that "[i]f the defendant suffered any wrong it was purely formal since… on the facts admitted there was no doubt of his guilt." In disagreeing with this view of the role of the jury, Brandeis retorted that "[w]hether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution, a mere formality," and opined that "the presiding judge [had] usurped the province of the jury…".

The debate over the efficacy and acceptance of jury nullification has animated the circuit courts. In United States v. Dougherty, Judge Leventhal, writing for the D.C. Circuit, traced the evolving attitude toward jury nullification reflected in American jurisprudence. He noted that "in colonial days and the early days of our Republic [there were a] variety of expressions…from respected sources – John Adams; Alexander Hamilton; prominent judges – that jurors had a duty to find a verdict according to their own conscience, though in opposition to the direction of the court; that their power-signified a right; that they were judges both of law and of fact in a criminal case, and not bound by the opinion of the court." However, he continued "[a]s the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law."

Sparf was the natural end point of this evolution, Leventhal wrote, establishing that "[t]he jury's role was respected as significant and wholesome, but it was not to be given instructions that articulated a right to do what ever it willed." Judge Leventhal concluded that juries ought not be advised of their power of nullification, as "its explicit avowal risks the ultimate logic of anarchy"; as for the occasional exceptional case where nullification was indeed appropriate, he believed that "[t]he totality of input [from literature, media, word of mouth, history and tradition] generally convey[s] adequately enough the idea of … freedom in an occasional case to depart from what the judge says," such that instructions to that end were not necessary. Judge Bazelon, in dissent, critized as "sleight-of-hand" the practice of intentionally hiding the right of nullification – the existence of which the majority had acknowledged – from the jury.

Quoting the eminent District Judge Jack Weinstein, the author of this interesting article took a more progressive view on nullification: *In spite of the recent trend towards discharging jurors who may nullify – a particular problem with the selection of jurors in capital cases – I am hesitant to dismiss intelligent prospective jurors. ... Concerns about jury nullification are largely unwarranted. Differences about evaluation of the facts based on differing life experiences ought not to be mistaken for nullification. There is some tendency to nullify based on conscience or individual circumstance in the face of laws a juror believes to be unjust. In my courtroom, I do not instruct juries on the power to nullify or not to nullify. Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested. I do believe, however, that judges can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values. Judge Bazelon was correct when he wrote: "I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just nullification doctrine." Citations and footnotes omitted.*

Thus, it appears, as succinctly stated by the learned judge in a federal gun trial in which I was defense counsel, that jurors do have the *power*, but not the *right*, to nullify in an appropriate case. It is occasionally for this reason, that no matter how strong the evidence, the trial is not "over" until the verdict comes in.

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